SUBJECT INDEX

PAGE

Statement 1

1. Statement of proceedings 1

2. Statement of facts 4

Question presented 12

Reasons for denying the writ 13

1. The decisions of the California courts were not based upon the fact that Petitioner's subsidiary was doing business in California as Petitioner represents. Instead they are consistent with the pertinent decisions of the United States Supreme Court in holding that a foreign corporation which becomes a party to contracts to be performed in a state and which were in fact performed in such state which sends its representatives into such state to supervise the performance of such contracts and the activities of its licensed subsidiary in the manufacture of the product for the advertising of which such contracts were entered into, which uses the fruits of such contracts in such state, and which is being sued in such state for breach of those contracts, is subject to the jurisdiction of the courts of that state 13

(a) Although the decisions of all three California courts were rendered without opinion, it is apparent that the fact of parent-subsidiary relationship between Petitioner and Rheingold, alone, had little, if anything, to do with their determinations 13

(b) The "contacts" between a foreign corporation and the state of the forum need not continue up to the time when the forum asserts jurisdiction over that corporation 15

PAGE

2. By moving to strike certain answers from the depositions and certain portions of affidavits which were offered in evidence, by filing its motion objecting to certain questions in depositions, and by moving to withdraw those motions, Petitioner made a general appearance before the Respondent Superior Court, thereby subjecting itself to the jurisdiction of that court 17

3. This Court should not grant Petitioner's request for a hearing because of the necessarily interlocutory character of the judgment of the California District Court of Appeal 18

Conclusion 19

Appendices:

Appendix A

Pertinent statutes involved 1

Appendix B

1. Affidavit of Glenn Warner 3
2. Affidavit of Herbert Klynn 10
3. Minute Order of Respondent Superior Court 15
4. Memorandum of Points and Authorities of Respondent Superior Court in Opposition to Alternative Writ of Mandate 17

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Chipman, Ltd. v. Jeffery Co., 251 U. S. 373	15
Consolidated Textile Corp. v. Gregory, 289 U. S. 85	15
Dare v. Bd. of Medical Examiners, 21 Cal. 2d 790, 136 P. 2d 304	19
Hammerstein v. Superior Court of California, 341 U. S. 491	19
Hedgebeth v. North Carolina, 334 U. S. 806	18
Hess v. Pawloski, 274 U. S. 352	16
International Shoe Co. v. Washington, 326 U. S. 310	14, 15
John v. Paullin, 231 U. S. 583	18
Lincoln v. Superior Court, 22 Cal. 2d 304, 139 P. 2d 13	17
MacPherson v. Superior Court, 22 Cal. App. 2d 425, 71 P. 2d 91; Pet. reh. den., Pet. hear. den.	17
McGee v. International Life Ins. Co., 355 U. S. 220	14, 16
Miller v. Miller, 57 Cal. App. 2d 354, 134 P. 2d 292	17
Newman v. Gates, 204 U. S. 89	18
Perkins v. Benguet Consolidated Mining Co., 342 U. S. 437	14, 15
Stein v. New York, 346 U. S. 156, Pet. den. 346 U. S. 842	12
White v. Ragin, 324 U. S. 760	18
Woods v. Nierstheimer, 328 U. S. 211	18
Young v. Masci, 289 U. S. 253	16

RULES

Revised Rules of the Supreme Court of the United States, Rule 21	3
California Rules on Appeal, Rule 12(a)	4, 11
California Rules on Appeal, Rule 56(c)	19

STATUTES

California Code of Civil Procedure, Sec. 1087	19

IN THE

Supreme Court of the United States

October Term, 1959.

No. 241

LIEBMANN BREWERIES, INC.,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES, UPA PICTURES, INC., UPA ENTERPRISES and COLUMBIA PICTURES CORPORATION,

Respondents.

Opposition of Respondents to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, Second Appellate District.

Statement.

1. Statement of Proceedings.

Respondents UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation (hereinafter for convenience herein collectively called "Respondents") filed an action for damages for breach of contract against defendants Foote, Cone & Belding, Inc., Liebmann Breweries, Inc. (hereinafter for convenience called "Petitioner") and Rheingold Brewing Company (hereinafter for convenience called "Rheingold") in the Superior Court of the State of California, in and for the County of Los Angeles. Process was served upon defendants Foote, Cone & Belding, Inc. and Rheingold in California. Petitioner is a New

York corporation, having its principal place of business in New York City, which has never qualified to do business in California. Rheingold's activities are limited to California and certain minor adjacent areas. For the purpose of obtaining evidence to establish that Petitioner is subject to the jurisdiction of the California courts, Respondents took the depositions of Byron Mayo, an employee of Foote, Cone & Belding, Inc., of Frank Delano, the Vice-President of Foote, Cone & Belding, Inc., and of Philip Liebmann, the President of Petitioner and of Rheingold.

Respondents served Petitioner by service upon the California Secretary of State. Petitioner filed its motion in the California Superior Court to quash such service of summons upon it, purporting to appear specially for that purpose, although also moving to strike portions of affidavits and depositions which the Respondents had offered in evidence. A hearing on said motion to quash was held and the Superior Court denied the motion.

Petitioner thereupon petitioned the District Court of Appeal of the State of California, Second Appellate District, for an alternative writ of mandate (*i.e.*, for an order to show cause why the writ should not be granted). Petitioner did not cause the record in the Superior Court to be transmitted to the District Court of Appeal for its consideration on Petitioner's application, but instead submitted to the District Court of Appeal only the evidence which Petitioner had presented to the Superior Court in support of its motion to quash service of summons (a device

adopted likewise by Petitioner before this Court). Petitioner failed to transmit to the District Court of Appeal any part of the evidence presented to the Superior Court by Respondents in opposition to Petitioner's motion to quash. Respondents did not oppose Petitioner's application for the alternative writ because they assumed that the District Court of Appeal would issue its order to show cause and that they would have an opportunity to oppose Petitioner's application at the hearing pursuant thereto. Respondent Superior Court, however, did file with the District Court of Appeal its points and authorities in opposition, pointing out that there was substantial evidence to support the order of the Superior Court denying Petitioner's motion to quash and quoting certain portions of the affidavit of Glenn Warner which had been filed in the Superior Court in opposition to said motion.[1] Hence, Petitioner's assertion that the allegations of fact contained in its petition to the District Court of Appeal of the State of California for an alternative writ of mandate must be accepted as true because unopposed is an assumption without foundation on the record. The District Court of Appeal denied Petitioner's application for an alternative writ summarily, without opinion and without Respondents ever having been heard by it. Petitioner thereupon petitioned the Supreme Court of the State of California for a hearing and that court denied its petition.

---

[1]Respondents have, in accordance with Rule 21, Revised Rules of the Supreme Court of the United States, heretofore filed a certified copy of the brief of Respondent Superior Court to augment the record filed herein by Petitioner. That brief is reproduced in Appendix B, commencing at page 17.

2. Statement of Facts.

Petitioner has now petitioned this Court for a writ of certiorari to review the judgment of the California District Court of Appeal. That petition is based almost entirely on the representation to this Court that the Superior Court and the District Court of Appeal based their decisions refusing to quash service of summons upon Petitioner on the fact that Petitioner's only contact with the State of California was through its subsidiary Rheingold which was doing business in California. Petitioner's argument is directed to the proposition that a parent corporation which has no contact with the forum, apart from its relationship with a subsidiary which is doing business in the forum, is not subject to the jurisdiction of the courts of the forum. It is true that at all times herein Rheingold was a subsidiary of Petitioner, but such parent-subsidiary relationship was only incidental to the decision of the California courts that Petitioner was doing business in the State of California. The actual facts[2] upon which Respondent Superior Court relied and which Petitioner has withheld from this Court, as it attempted to withhold them from the California District Court of Appeal, were:

> that in November of 1955, Foote, Cone & Belding, Inc. entered into a contract with Respondents UPA

[2]Respondents have, in accordance with Rule 21, Revised Rules of the Supreme Court of the United States, heretofore filed a certified copy of each of the depositions of Philip Liebmann, President of Petitioner and Rheingold, Frank Delano, Vice-President of Foote, Cone & Belding, Inc., and Byron Mayo, an employee of Foote, Cone & Belding, Inc., together with the affidavit of Herbert D. Klynn, Vice-President of Respondent UPA Pictures, Inc., and the affidavit of Glenn Warner, counsel for Respondents, all of which were offered in evidence by Respondents at the hearing before the Superior Court and which were available to the District Court of Appeal for consideration in connection with Petitioner's application for an alternative writ of mandate. (*Cal. Rules on Appeal*, Rule 12(a).)

Enterprises and Columbia Pictures Corporation which, Foote, Cone & Belding, Inc. recited, was "on behalf of our client Rheingold Brewing company and/or Liebmann Breweries, Inc. (herein called 'Client')" and likewise entered into another agreement with Respondent UPA Pictures, Inc. "on behalf of our client Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called 'Client')" [Amended Complaint, Exs. "A," "C"];

that the first of said contracts provided for the licensing by UPA Enterprises and Columbia Pictures Corporation to such "Client" of the fanciful character "Mister Magoo" for the purpose of advertising Rheingold beer in California, and the second contract required UPA Pictures, Inc. to produce certain so-called "television spot commercials" featuring "Mister Magoo" for the advertising of Rheingold beer in California. It is provided in Paragraph B on the first page of the first such contract that Foote, Cone & Belding, Inc. was to have an option "after the delivery to Client in New York City of the storyboards . . ." [Amended Complaint, Ex. "A"] and in the second paragraph on the first page of the second such contract that storyboards had been heretofore prepared and delivered to "Client" in New York City . . ." [Amended Complaint, Ex. "C"];

that Foote, Cone & Belding, Inc. advised Herbert Klynn, the negotiating representative of Respondents in connection with such contracts, that it was negotiating with reference to the contracts referred to in the two immediately preceding paragraphs on behalf of its client Petitioner, the Respondents at all times believed that they were dealing with Petitioner as a

principal, and at no time were they advised to the contrary [Affidavit of Herbert Klynn, p. 1, par. 1; p. 5 par. 9; Deposition of Philip Liebmann, pp. 304, 305];

that Philip Liebmann came to California and participated in several meetings with representatives of Respondents looking to the formation of such contracts [Deposition of Philip Liebmann, p. 294; Affidavit of Herbert Klynn, pp. 2-4, pars. 4-6];

that during the negotiations relating to such contracts and while those contracts were being performed by Respondents, Philip Liebmann met with representatives of Respondents on several occasions in California, but never at the offices of Rheingold [Affidavit of Herbert Klynn, pp. 3, 4, par, 6];

that at the inception of negotiations relating to such contracts Philip Liebmann told representatives of Respondents, including Klynn, that it was necessary for him, Philip Liebmann, to present the idea of using the Magoo character for advertising Rheingold beer to Stockholders and members of the Board of Directors of Petitioner who lived in Europe [Deposition of Philip Liebmann, pp. 296, 297; Affidavit of Herbert Klynn, p. 2, par. 4; see also the Deposition of Byron Mayo, pp. 30, 31];

that during the course of such negotiations Philip Liebmann detailed Petitioner's history and background to Herbert Klynn [Deposition of Philip Liebmann, p. 296; Affidavit of Herbert Klynn, p. 3, par. 5];

that Frank Delano, the senior Vice-President of Foote, Cone & Belding, Inc., who executed such con-

tracts with Respondents, is the management representative of Foote, Cone & Belding, Inc. for Petitioner and is directly responsible for the supervision of all Petitioner advertising [Deposition of Frank Delano, pp. 5-7];

that Dr. Hermann Schuelein, the Chairman of the Board and chief executive officer of Petitioner in 1955 (at the time such contracts were executed), conferred with Respondents in California relating to the execution of such contracts and approved newspaper advertising for Rheingold beer in both California and New York [Deposition of Philip Liebmann, pp. 205, 287; Affidavit of Herbert Klynn, p. 3, par. 5; Deposition of Byron Mayo, p. 8; Deposition of Frank Delano, pp. 43, 44, Ex. 8];

that Byron Mayo met with William Mathews, an employee of Foote, Cone & Belding, Inc. and the senior account executive assigned by it to Petitioner's advertising account, on several occasions in California during the period from September, 1955, until May, 1956, but he never met with Mr. Mathews at the Los Angeles plant of defendant Rheingold [Deposition of Byron Mayo, p. 24];

that said William Mathews received copies of correspondence relating to the Mister Magoo commercials which were the subject of such contracts [Deposition of Byron Mayo, p. 20; Deposition of Frank Delano, Exs. 1, 11, 12, 13, 15, 16, 20 and 34];

that it was the practice of Foote, Cone & Belding, Inc. to inform Philip Liebmann in New York and to obtain his approval in New York of all developments in connection with advertising Rheingold beer through

the use of the Magoo character [Deposition of Byron Mayo, pp. 37, 38, 40, 42-44; Deposition of Frank Delano, pp. 58, 59; Deposition of Philip Liebmann, pp. 314-315];

that Philip Liebmann used the letterhead of Petitioner in addressing communications to the Respondents and to Foote, Cone & Belding, Inc. relating to such contracts [Deposition of Philip Liebmann, Exs. 28, 29, and 33];

that Philip Liebmann could not recall either the California telephone number or street address of Rheingold when his deposition was taken although he knew both the New York telephone number and street address of Petitioner [Deposition of Philip Liebmann, pp. 204, 216, 217, and 231];

that during the period from September, 1955, until May, 1956, Byron Mayo, who was the account executive assigned by Foote, Cone & Belding, Inc. to cooperate with UPA Pictures, Inc. in the making of such television spot commercials by UPA Pictures, Inc. met in California with Philip Liebmann on at least sixty (60) different occasions [Deposition of Byron Mayo, pp. 23, 24];

that the spot commercials featuring "Mister Magoo" were made and approximately four hundred sixty-five (465) prints of these commercials were broadcast over numerous stations in California dozens of times each day throughout the period of approximately one (1) year [Affidavit of Herbert Klynn, p. 4, par. 8];

that in April of 1956, Frank Delano addressed a confidential memorandum to Philip Liebmann in New York in which he considered the possibilities of ex-

tending the Magoo license for California to the territory of Yuma, Arizona, and of obtaining a license to use the Magoo character to advertise Rheingold beer in New York and in which memorandum he referred to the "California commitment" and the "New York commitment" as a "total commitment" [Deposition of Frank Delano, Ex. 16];

that Philip Liebmann instructed Frank Delano to discuss Petitioner's dispute with Respondents concerning the contracts in issue with Walter Liebmann, who is general counsel for, and an officer and member of the Board of Directors of, Petitioner, but who is not now and never has been either a member of the Board of Directors or an officer of Rheingold [Deposition of Philip Liebmann, pp. 213-215, 229, 230, 243 and 244];

that Petitioner is a well known eastern brewing-distributing company which has used the trade name and registered trademark "Rheingold" for more than sixty (60) years [Deposition of Philip Liebmann, pp. 206, 211, 212];

that in 1954, Petitioner licensed Rheingold (then called "Acme Brewing Co.") to use Petitioner's trademark "Rheingold" in the manfacture and sale by Rheingold of beer in California [Deposition of Philip Liebmann, p. 243; Ex. 30];

that during a period of approximately two (2) years, commencing in 1954, Petitioner loaned key employees and "a great many of its technicians" to Rheingold for the purpose of supervising the manufacture of Rheingold beer by Rheingold at the Rheingold brewery in California in order to assure the continued high quality of such beer, and that all of these

key employees and technicians, with only three (3) exceptions, remained employees of Petitioner during the time they were in California. Only three actually moved to California, the rest maintaining their homes in the New York area. Moreover, all of these key employees and technicians (with the exception of one who severed his relationship with Petitioner and moved to California) returned to the New York plant of Petitioner upon the termination of the activities of Rheingold in California [Deposition of Philip Liebmann, pp. 248, 250, 252-254, 290, 291];

that during a period of approximately six (6) months Petitioner processed yeast compounds in New York and shipped them to Rheingold in California where they were utilized by Rheingold to brew its beer [Deposition of Philip Liebmann, p. 255];

that samples of bottlings of defendant Rheingold's beer were regularly shipped to Petitioner in New York where they were tested and inspected [Deposition of Philip Liebmann, p. 256];

that beer in the process of manufacture was likewise made available to Petitioner by Rheingold for examination and inspection [Deposition of Philip Liebmann, pp. 256-257];

that ingredients used by Rheingold in brewing its beer were sent by Rheingold to Petitioner in New York to be analyzed and tested, particularly whenever a supplier of those ingredients was changed, and Rheingold was supposed to inform Petitioner whenever it did change suppliers [Deposition of Philip Liebmann, pp. 257-259];

that Petitioner continuously sent its representatives into the Rheingold plant in California to make inspections and tests of facilities, equipment, materials and product [Deposition of Philip Liebmann, pp. 260, 261];

that specimens of all labels, bottles, cans and other containers used by defendant Rheingold were continuously submitted to Petitioner for approval throughout the period of the operation of Rheingold in California [Deposition of Philip Liebmann, p. 262];

that all advertising and promotion material to be used by Rheingold in connection with the sale and advertising of its beer in California was submitted to Petitioner for its approval [Deposition of Philip Liebmann, pp. 262, 263];

that the license agreement between Petitioner and Rheingold provided that Petitioner would own all advertising and promotional ideas developed by Rheingold and that all advertising material would be copyrighted in the name of Petitioner [Deposition of Philip Liebmann, pp. 262, 263; Ex. 30, p. 7, par. 8; Ex. 31, p. 7, par. 8 to Deposition of Philip Liebmann].

Although the foregoing facts were before the Superior Court, Petitioner did not include them in the record which it submitted to the District Court of Appeal. Nevertheless, the entire record of proceedings before Respondent Superior Court was available to the District Court of Appeal for its consideration in ruling upon Petitioner's application for an alternative writ of mandate. (California Rules on Appeal, Rule 12(a).)

This Court, likewise, has the inherent power to penetrate the judgment of an appellate court which it is requested to review and to study the record of the trial court for the purpose of ascertaining the facts upon which to predicate a ruling. (*Stein v. New York* (1953), 346 U. S. 156, rehear. den. 346 U. S. 842.) Respondents have, accordingly, augmented the record herein to include the foregoing facts. Portions of that record, consisting of the affidavits of Glenn Warner and Herbert Klynn are reproduced in Appendix B, commencing at pages 3 and 10, respectively.

Question Presented.

Whether a state court has jurisdiction over a foreign corporation where (1) the foreign corporation has entered into contracts to be performed in the state and which were performed in the state for more than one year; (2) it has (by various means, including the sending of officers, employees and agents into the state) supervised the performance of such contracts and systematically and continuously supervised and controlled the activities of its subsidiary corporation in the state during the period of performance of said contracts and in connection with the manufacture and sale of beer, the sale of which was promoted by the television spot commercials made and exhibited pursuant to the terms of said contracts; (3) it has enjoyed in the state the fruits of such contracts for a period over a year; and (4) it is being sued in such state court for a breach of such contracts.

Reasons for Denying the Writ.

1. **The Decisions of the California Courts Were Not Based Upon the Fact That Petitioner's Subsidiary Was Doing Business in California as Petitioner Represents. Instead They Are Consistent With the Pertinent Decisions of the United States Supreme Court in Holding That a Foreign Corporation Which Becomes a Party to Contracts to Be Performed in a State and Which Were in Fact Performed in Such State, Which Sends Its Representatives Into Such State to Supervise the Performance of Such Contracts and the Activities of Its Licensed Subsidiary in the Manufacture of the Product for the Advertising of Which Such Contracts Were Entered Into, Which Uses the Fruits of Such Contracts in Such State, and Which Is Being Sued in Such State for Breach of Those Contracts, Is Subject to the Jurisdiction of the Courts of That State.**

Petitioner rests its case upon the dual proposition that a foreign corporation may not be subjected to the jurisdiction of the forum state merely because a subsidiary of that corporation did business within the state and that "the foreign corporation must be carrying on the jurisdictional activities in the forum at the time of the purported service of Summons." The first proposition simply ignores the facts. The second is not an accurate statement of law. Considering Petitioner's contentions in order:

(a) *Although the Decisions of All Three California Courts Were Rendered Without Opinion, It Would Appear That the Fact of Parent-Subsidiary Relationship Between Petitioner and Rheingold, Alone, Had Little, if Anything, to Do With Their Determinations.*

If Petitioner had not been a parent of Rheingold, the decision of the lower courts would have been precisely the

same. The controlling evidentiary facts are that Petitioner was present in California when through its key employees and technicians (physically present in California) it exercised supervisory controls over the manufacture of beer in California by Rheingold, when it licensed Rheingold to manufacture beer in California, and when it negotiated, became a party to and supervised the performance in California of the contracts with Respondents upon which this litigation is based. Certainly a decision based upon those factors would not be in conflict with previous decisions of this Court nor would it present an important question of constitutional law to merit a hearing by this Court. In *Perkins v. Benguet Consolidated Mining Co.* (1952), 342 U. S. 437, this Court held that a foreign corporation was doing business in the state of the forum because of the continuous and systematic supervisory activities of the affairs of that corporation by its president who resided in the forum state. Petitioner engaged in similar supervisory activities in California through the agency of its officers, key employees and technicians. A foreign corporation has been held by this Court to be doing business in the state of the forum when, as here, "it had exercised the privilege of conducting activities within the state and enjoyed the benefits and protections of the laws of that state" (*International Shoe Co. v. Washington* (1945), 326 U. S. 310); and when, as here, it entered into a contract with the plaintiff to be performed in that state, and the litigation arose out of that contract (*McGee v. International Life Ins. Co.* (1957), 355 U. S. 220).

(b) *The "Contacts" Between a Foreign Corporation and the State of the Forum Need Not Continue Up to the Time When the Forum Asserts Jurisdiction Over That Corporation.*

The cases cited by Petitioner at page 14 of its brief for the proposition that the jurisdictional activities of a foreign corporation must be carried on at the time of the purported service of summons upon it if the forum is to assert jurisdiction over it are not authority for that proposition, and were not decided upon facts which are even remotely related to the proposition for which they are cited. Thus, in *Consolidated Textile Corp. v. Gregory* (1933), 289 U. S. 85, this Court found that the foreign corporation had engaged in no business activities whatever within the state of the forum and that its only contact with such state consisted of the presence there of its president for the purpose of discussing the settlement of a law suit which was then pending against the corporation outside the state. In *Perkins v. Benguet Consolidated Mining Co.* (1952), 342 U. S. 437, and in *International Shoe Co. v. Washington* (1945), 326 U. S. 310, although the jurisdictional activity was continuing at the time of service of process upon the foreign corporation, there is no indication whatever in either decision that jurisdiction would not attach, absent that factor. Finally, in *Chipman, Ltd. v. Jeffery Co.* (1920), 251 U. S. 373, this Court expressly noted that the contracts upon which plaintiff sued were executed outside the state of the forum, were to be performed outside the state, and that there was no allegation that the causes of action arose out of acts or

transactions which occurred within the state. This Court then disposed of the case by reference to the law and decisions of the courts of New York and did not purport to hold that jurisdiction over Petitioner was dependent upon its doing business in the state of the forum at the time process was served upon it.

We shall not belabor this point. In *McGee v. International Life Ins. Co.* (1957), 355 U. S. 220, this Court held that a foreign corporation whose only act in the forum state had been the assumption of the obligations of a contract of life insurance to be performed in the forum state was properly subject to the jurisdiction of the courts of that state in a subsequent action based upon breach of that contract. It is of at least passing interest that this decision is ignored by Petitioner in its brief. Not only is this decision a conclusive answer to the assertion that a foreign corporation's jurisdictional activities must continue up to and including the date of the service of summons, but also it affords more than ample basis for a finding that the contracts between Petitioner and Respondents subjected Petitioner to the jurisdiction of the California courts in this action for the breach of those contracts. (See also, *Young v. Masci* (1933), 289 U. S. 253; *Hess v. Pawloski* (1927), 274 U. S. 352.)

2. By Moving to Strike Certain Answers From the Depositions and Certain Portions of Affidavits Which Were Offered in Evidence, by Filing Its Motion Objecting to Certain Questions in Depositions, and by Moving to Withdraw Those Motions, Petitioner Made a General Appearance Before the Respondent Superior Court, Thereby Subjecting Itself to the Jurisdiction of That Court.

Under California rules of pleading and practice a litigant who enters a special appearance to challenge the jurisdiction of the court will be held to have made a general appearance if he raises any question beyond that of jurisdiction or asks for relief which could be granted only upon the hypothesis that the court had jurisdiction over his person. (*Lincoln v. Superior Court* (1943), 22 Cal. 2d 304, 311-312, 139 P. 2d 13; *MacPherson v. Superior Court* (1937), 22 Cal. App. 2d 425, 430-431, 71 P. 2d 91, Pet. rehear. den., Pet. hear. den.; *Miller v. Miller*, (1943), 57 Cal. App. 2d 354, 359-360, 134 P. 2d 292.)

Respondents have, as heretofore noted, caused additional certified portions of the record before Respondent Superior Court to be transmitted to this Court. Included in that record is the "Motion of Liebmann Breweries, Inc. Appearing Specially Only on the Motion to Quash Service of Summons to: (1) Object to questions in depositions offered in evidence by plaintiffs; (2) Move to strike answers in depositions offered by plaintiffs; and (3) Move to strike portions of affidavits offered in evidence by plaintiffs," dated April 2, 1959, which was filed by Petitioner. At the hearing before Respondent Superior Court the Respondents asserted that in making those motions Petitioner had submitted itself to the jurisdiction of the court because it had requested affirmative relief which could properly be given only to a party to the proceedings.

During the course of that hearing Petitioner moved Respondent Superior Court for permission to withdraw said motions and that permission was granted (Minute Order of Respondent Superior Court, Appendix B, p. 15). Respondents contended at that time and still contend that in making a motion to withdraw such motions Petitioner was requesting still further affirmative relief from Respondent Superior Court and thus again submitting itself to the general jurisdiction of that court.

This Court will give effect to local rules of practice and procedure. (*John v. Paullin* (1913), 231 U. S. 583; *Newman v. Gates* (1907), 204 U. S. 89.)

Inasmuch as the California courts could have found that Petitioner had made a general appearance and had thus submitted itself to the jurisdiction of Respondent Superior Court under the California rules of practice and procedure, and inasmuch as the decisions of the California courts were rendered without opinion, this Court should not accept certiorari. (*Hedgebeth v. North Carolina* (1948), 334 U. S. 806; *Woods v. Nierstheimer* (1946), 328 U. S. 211; *White v. Ragen* (1945), 324 U. S. 760.)

3. This Court Should Not Grant Petitioner's Request for a Hearing Because of the Necessarily Interlocutory Character of the Judgment of the California District Court of Appeal.

If Petitioner were correct and if the California District Court of Appeal incorrectly refused its petition for an alternative writ of mandate so that a decision favorable to Petitioner should be entered in this Court after granting certiorari, the only effect of that decision would be to compel the District Court of Appeal in California to issue an alternative writ of mandate whereupon it would recon-

sider the issues presented here upon the entire record before the Superior Court as though upon a hearing for an order to show cause. (Cal. Code Civ. Proc., Sec. 1087; Rule 56(c), Calif. Rules on Appeal; *Dare v. Bd. of Medical Examiners* (1943), 21 Cal. 2d 790, 797, 136 P. 2d 304.)

Under circumstances strikingly similar to those here presented this Court held that the interlocutory character of the judgment before it justified its refusal to accept certiorari. (*Hammerstein v. Superior Court of California* (1951), 341 U. S. 491.)

Conclusion.

To summarize Respondents' position:

Following the refusal of the California Superior Court to grant Petitioner's motion to quash service of summons upon it, during the course of which Respondents believe Petitioner made a general appearance, Petitioner has succeeded in avoiding the necessity of answering the complaint of Respondents herein for approximately eight months. During the interim, in each instance when Petitioner sought relief from an appellate court, it withheld that part of the record below which supported the decision of the Superior Court. In each instance it boldly took the position that the court below based its decision solely upon the fact that Rheingold, which was doing business in California, was a subsidiary of Petitioner.

Respondents respectfully urge that an examination of the record before the California Superior Court will compel the conclusion that the California courts arrived at their respective decisions because the record before the Superior Court showed that Petitioner is being charged as a party for breach of contracts which were to be performed in

California, which were in fact performed in California under the supervision of representatives of Petitioner, under which Petitioner enjoyed benefits in California for a period of over a year, and which were designed to advertise and promote the brewing and sale of beer in California by Petitioner's licensed subsidiary, the activities of which Petitioner closely, continuously and systematically supervised by means of numerous representatives of Petitioner physically in California.

Therefore, Respondents respectfully urge that Petitioner's petition be denied.

GORDON E. YOUNGMAN of
YOUNGMAN, HUNGATE & LEOPOLD,
RICHARD HUNGATE,
GLENN WARNER,
Attorneys for Respondents.

APPENDIX A.

Pertinent Statutes Involved.

"*Contents; alternative writ; peremptory writ*

"The writ may be either alternative or peremptory. The alternative writ must command the party to whom it is directed immediately after the receipt of the writ, or at some other specified time, to do the act required to be performed, or to show cause before the court at a specified time and place why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return day inserted."

California Code of Civil Procedure, Section 1087.

"6. Any respondent, including a cross-petitioner, may, within the time allowed for filing his brief in opposition or his cross-petition, file duly certified portions of the record additional to those filed by the petitioner."

Revised Rules of the Supreme Court of the United States, Rule 21, subsection 6.

"(a) Augmentation. On suggestion of any party or on its own motion, the reviewing court, on such terms as it deems proper, may order that the original or a copy of a paper, record or exhibit offered at or used on the trial or hearing below and on file in or lodged with the superior court be transmitted to it, or that portion of the oral proceedings be transcribed, certified and transmitted to it, or that an agreed or settled statement of portions of the oral proceedings be prepared and transmitted to it; and when so transmitted they shall be deemed a part of the record on appeal.

California Rules on Appeal, Rule 12(a).

"(c) Return. If the petition is granted, with or without prior service or opposition, and a writ or order to show cause issues, the respondent or real party in interest, or both, separately or jointly, may make a return, by demurrer, verified answer or both. Unless a different return date is specified by the court, the return shall be made at least 5 days before the date set for hearing. If the return is by demurrer alone, and the demurrer is not sustained, the peremptory writ may issue without leave to answer."

California Rules of Appeal, Rule 56(c).

APPENDIX B.

Affidavit of Glenn Warner.

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc. and Rheingold Brewing Company, Defendants. No. 698,923.

State of California, County of Los Angeles—ss:

GLENN WARNER, being first duly sworn, deposes and says:

1. He is an attorney at law duly licensed to practice law in the State of California and a partner in the firm of Youngman, Hungate & Leopold, who are counsel for plaintiffs in the above matter.

2. He makes this affidavit in opposition to the motion of defendant Liebmann Breweries, Inc. (hereinafter called "Liebmann") to quash service of summons heretofore made upon it.

3. Defendant Liebmann is a New York corporation which has manufactured and distributed beer on the eastern seaboard of the United States under the trade name and registered trade mark "Rheingold" for more than 60 years. Defendant Rheingold Brewing Company (hereinafter called "Rheingold"), on the other hand, limited its activities in the brewing and distribution of beer to California and some marginal areas.

4. Defendant Liebmann owns 5/6ths of the capital stock of Continental Holding Corporation, which, in turn, owns all of the stock of defendant Rheingold. Philip Liebmann is the President of defendant Liebmann and

likewise is the President of defendant Rheingold. The members of the Board of Directors of defendant Rheingold are likewise members of the Board of Directors of defendant Liebmann.

5. On February 8, 1954, defendant Liebmann licensed Acme Brewing Company to use Leibmann's registered trade mark "Rheingold" in connection with the manufacture and distribution of beer in California. Thereafter, and until sometime during the spring of 1957, beer was manufactured and distributed in California under the trade mark "Rheingold" by Acme Brewing Company or its successor corporation, defendant Rheingold.

6. On or about November 30, 1955, defendant Foote, Cone & Belding, Inc. executed a contract with plaintiffs UPA Enterprises, Inc. and Columbia Pictures Corporation "on behalf of our client Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called 'client') and likewise entered into an agreement with plaintiff UPA Pictures 'on behalf of our client Rheingold Brewing Company and/or Liebmann Breweries, Inc. (herein called "Client").'"

7. The two agreements pursuant to which defendant Liebmann granted to defendant Rheingold and its predecessor corporation, Acme Brewing Company, a license to manufacture and distribute Rheingold Beer in California are attached to the Liebmann deposition on file herein and are identified as Exhibits 30 and 31.

8. Defendant Liebmann received no consideration for the license other than the nominal $1.00 payment which is recited in the agreements.

9. During a period of approximately two years, Liebmann loaned key employees to Rheingold and, as Philip

Liebmann testified, ". . . Over a long period of time a great many technicians were lent to the company." All of these technicians with only three exceptions remained employees of Liebmann throughout the time that they were made available to Rheingold in California. Only three actually moved to California, the rest maintaining their homes in the New York area. Moreover, all of those technicians (with the exception of one who severed his relationship with Liebmann and moved to California) returned to the New York plant of defendant Liebmann upon the termination of the activities of defendant Rheingold in California.

10. During a period of approximately six months Liebmann processed yeast compounds in New York and shipped them to Rheingold in California where they were utilized by Rheingold to brew its beer.

11. Samples of bottlings of defendant Rheingold's beer were regularly shipped to Liebmann in New York where they were tested and inspected.

12. Beer in the process of manufacture was likewise made available to Liebmann by Rheingold for examination and inspection.

13. Ingredients used by defendant Rheingold in brewing its beer were sent by Rheingold to Liebmann in New York to be analyzed and tested, particularly whenever a supplier of those ingredients was changed, and Rheingold was supposed to inform Liebmann whenever it did change suppliers.

14. The foregoing tests and inspections were performed continuously "as long as the operation continued."

15. Liebmann continuously sent its representatives into the Rheingold plant to make inspections and tests of facilities, equipment, materials and product.

16. Specimens of all labels, bottles, cans and other containers used by defendant Rheingold were continuously submitted to Liebmann for approval throughout the period of the operation of Acme Brewing Company and Rheingold in California.

17. All advertising and promotion material to be used by Rheingold in connection with the sale and advertising of its beer in California was submitted to Liebmann for its approval.

18. The license agreements provided that Liebmann would own all advertising and promotional ideas developed by Rheingold and that all advertising material would be copyrighted in the name of Liebmann.

19. The first presentation by Foote, Cone & Belding, Inc. of ideas for the Magoo commercials was made in New York and not in California.

20. Philip Liebmann came to California and participated in several meetings with representatives of plaintiffs looking to the formation of the contracts.

21. Philip Liebmann used the letterhead of Liebmann in addressing communications to plaintiffs and to defendant Foote, Cone & Belding, Inc. relating to the contracts.

22. Throughout the period of negotiations relating to the contracts and during the period of time those contracts were being performed, Philip Liebmann met with representatives of plaintiffs on several occasions in California but never at the offices of Rheingold.

23. During the period from September, 1955, until May, 1956, Byron Mayo of Foote, Cone & Belding, Inc. met in California with Philip Liebmann on at least sixty different occasions.

24. Philip Liebmann could not recall either the telephone number or street address of Rheingold when his deposition was taken although he did know both the telephone number and street address of Liebmann.

25. Philip Liebmann told representatives of plaintiffs that it was necessary for him to present the idea of using the Magoo character to advertise Rheingold beer to stock holders and members of the Board of Directors of Liebmann who lived in Europe.

26. During the course of negotiations, Philip Liebmann detailed Liebmann's history and background to Herbert D. Klynn, a representative of plaintiffs.

27. Before the license agreement was executed and during the period of performance thereunder, defendant Foote, Cone & Belding, Inc. was instructed by Philip Liebmann to attempt to obtain a license to use the character, Mr. Magoo, to advertise Rheingold beer in the New York area.

28. Frank Delano, the senior Vice-President of defendant Foote, Cone & Belding, Inc., who executed the contracts with plaintiffs is the management representative of that company for Liebmann and is directly responsible for the supervision of all Liebmann advertising.

29. William Mathews, an employee of Foote, Cone & Belding, Inc. and the senior account executive assigned by it to the Liebmann advertising account, received copies of correspondence relating to the Magoo commercials.

30. Byron Mayo met with William Mathews in California on several occasions during the period from September, 1955, until May, 1956. He never met with Mr. Mathews at the Los Angeles plant of defendant Rheingold.

31. Dr. Hermann Schuelein, the Chairman of the Board and chief executive officer of Liebmann in 1955 conferred with plaintiffs in California relating to the execution of the contracts in issue and approved newspaper advertising for Rheingold beer in California and New York.

32. It was the practice at Foote, Cone & Belding, Inc. to keep Philip Liebmann informed of all developments in connection with advertising Rheingold beer through the use of the Magoo character, all approvals relating to that advertising were obtained by Mr. Delano from Philip Liebmann and whenever it wanted critical judgment in connection with such advertising Foote, Cone & Belding, Inc. consulted Philip Liebmann.

33. In April of 1956, Frank Delano addressed a confidential memorandum to Philip Liebmann in which he considered the possibilities of extending the Magoo license for California to the territory of Yuma, Arizona, obtaining a license to use the Magoo character to advertise Rheingold beer in New York and referred to the "California commitment" and the "New York commitment" as a "total commitment."

34. Philip Liebmann never told anyone representing the plaintiffs nor authorized anyone to tell them that Liebmann was not a party to the contracts in issue.

35. When a dispute developed between plaintiffs and defendants with respect to defendants' responsibilities under the contracts, Frank Delano addressed letters to plaintiffs in which he referred to his "clients" in the plural.

36. Philip Liebmann instructed Frank Delano to discuss the dispute with plaintiffs concerning the contracts in issue with Walter Liebmann who is general counsel

for, and an officer and member of the Board of Directors of, defendant Liebmann. Mr. Walter Liebmann is not now and never has been either a member of the Board of Directors or an officer of Rheingold Brewing Company.

GLENN WARNER
GLENN WARNER

Subscribed and sworn to before me this 27th day of March, 1959.

GRACE M. SAKAGUCHI
Notary Public in and for said County and State.
My Comm. Expires Oct. 7, 1961

Affidavit of Herbert D. Klynn.

In the Superior Court of the State of California in and for the County of Los Angeles.

UPA Pictures, Inc., UPA Enterprises and Columbia Pictures Corporation, Plaintiffs, vs. Foote, Cone & Belding, Inc., Liebmann Breweries, Inc. and Rheingold Brewing Company, Defendants.. No. 698,923.

State of California, County of Los Angeles—ss.

HERBERT D. KLYNN, being first duly sworn, deposes and says:

1. I am a Vice President of UPA Pictures, Inc. During the month of September, 1955, Gene Fox of the Hollywood office of Foote, Cone & Belding, Inc. telephoned me and asked if UPA Pictures, Inc. would be interested in licensing its character, Mr. Magoo, for use in advertising Rheingold beer for Liebmann Breweries, Inc. I agreed to cause UPA Pictures, Inc. to prepare a 20 second and 60 second rough story board for presentation to Mr. Philip Liebmann in New York City. I had planned a business trip to New York City and Byron Mayo, of Foote, Cone & Belding, Inc. asked me to meet in New York with representatives of Foote, Cone & Belding, Inc. for the purpose of working out a proposed program.

2. I arrived in New York City during the week of September 15, 1955, where I conferred with Roger Pryor and Byron Mayo of Foote, Cone & Belding, Inc. at the offices of Foote, Cone & Belding, Inc. and discussed the possible terms for the use of the character, Mr. Magoo, in advertising Rheingold beer. Byron Mayo and Roger Pryor told me at that meeting that the two story boards which had been prepared by UPA Pictures, Inc. were to

be presented to Philip Liebmann of Liebmann Breweries, Inc. in New York and that they expected to be able to give us an immediate answer as to whether or not Philip Liebmann wished to use the character, Mr. Magoo, to advertise Rheingold beer.

3. I had only this one meeting with representatives of Foote, Cone & Belding, Inc. in New York City but just before I returned to California I talked with Byron Mayo on the telephone and inquired about the status of the presentation to Philip Liebmann. Byron Mayo told me that the presentation had not yet been made but agreed to advise me on the coast of Mr. Liebmann's reaction to it.

4. I returned to California on September 26, 1955, and within a day or two after that Byron Mayo telephoned me and said that the presentation of the Magoo idea to Philip Liebmann had been highly successful and that Philip Liebmann was coming to California to discuss with me the licensing of the character, Mr. Magoo, for use in advertising Rheingold beer. During the week of September 26, 1955, I met with Philip Liebmann, Byron Mayo and other persons whom I cannot recall at the Beverly Hills Hotel for the purpose of further discussing this arrangement. At that time, Philip Liebmann told me that he was very serious about the use of Mr. Magoo to advertise Rheingold beer and that he was going to Europe to present that plan to European members of the Board of Directors of his company. He requested a verbal option for the use of the character, Mr. Magoo, until October 25, 1955, to which I agreed. Thereafter, I received a letter from Mr. Philip Liebmann on the letterhead of Liebmann Breweries, Inc. dated October 12, 1955, which is attached to the Delano deposition herein as Exhibit 33 in which he acknowledged that meeting.

5. During the latter part of October, 1955, Philip Liebmann came to Los Angeles from New York to resume our discussions and I met with Mr. Liebmann and Mr. Mayo on at least two occasions at the Beverly Hills Hotel and once at the offices of UPA Pictures, Inc. During these meetings Mr. Liebmann explained the background and history of Liebmann Breweries, Inc. and explained his understanding of the way to apply the character, Mr. Magoo, to the advertising of Rheingold beer. Dr. Hermann Schuelein, who was introduced to me as the Chairman of the Board and Chief Brewmaster of Liebmann Breweries, Inc. attended the meeting at the offices of UPA Pictures, Inc. and I also met Frank Delano at that meeting for the first time. I distinctly recall that during one of the meetings at the Beverly Hills Hotel Philip Liebmann talked on the long distance telephone to someone in Europe. That telephone conversation did not relate to any of the UPA matters but it did involve something regarding Liebmann Breweries, Inc. Mr. Liebmann became so excited as a result of that telephone call that he took off his shoe, pounded on the bed and adjourned the meeting. It was my understanding throughout the period of these negotiations that Philip Liebmann and Foote, Cone & Belding, Inc. were representing Liebmann Breweries, Inc. and I was never informed by anyone that they were representing anyone other than Liebmann Breweries, Inc. in connection with the proposed commercial use of the character, Mr. Magoo. I recall the word "Rheingold" being used but it was always my understanding that that word referred to the product to be exploited and not to Rheingold Brewing Company.

6. Throughout the months of September, October and November, 1955, I met with Philip Liebmann on several

occasions and also with Frank Delano of Foote, Cone & Belding, Inc. for the purpose of negotiating the terms of the contracts which were ultimately executed on November 30, 1955. All of those meetings were held either at the Beverly Hills Hotel or at the offices of UPA Pictures, Inc. and I understand that Mr. Ernest Scanlon, the Executive Vice President of UPA Pictures, Inc. conferred with Philip Liebmann and certain representatives of Foote, Cone & Belding, Inc. at the office of Hecht and Lancaster in Hollywood, California, during this same period of time. I never met either Philip Liebmann or any other person at the offices of Rheingold Brewing Company for the purpose of negotiating these contracts nor did anyone else representing any of the plaintiffs in this action.

7. An integral part of these discussions involved the possibility of using the character, Mr. Magoo, not only for advertising Rheingold beer in California but also in New York and during the course of these meetings Foote, Cone & Belding, Inc. caused to be prepared and submitted to me a draft of a proposed license agreement for the use of the character, Mr. Magoo, to advertise Rheingold beer which provided for an option to license that character in the New York area. That draft was not acceptable to UPA Pictures, Inc., however, and the final form of the contract did not provide for the use of the character, Mr. Magoo, in the New York area.

8. On or about November 30, 1955, the contracts which are attached to the Amended Complaint on file herein and designated Exhibits "A" and "C" were executed and thereafter plaintiff UPA Pictures, Inc. produced eight 60 second spot commercials and one special commercial using the character, Mr. Magoo, to advertise

Rheingold beer. UPA Pictures, Inc. caused a total of 465 prints of those commercials to be prepared and they were broadcast over numerous stations in California dozens of times each day throughout the period of approximately one year.

9. It has always been my understanding that Foote, Cone & Belding, Inc. was acting as an agent for Liebmann Breweries, Inc. when it negotiated and executed the contracts and I have never been informed by any person that this was not the case.

/s/ HERBERT D. KLYNN
HERBERT D. KLYNN

Subscribed and sworn to before me this 24 day of March, 1959.

/s/ HELEN H. CLABAUGH
Notary Public in and for said County and State.

(Seal)

Commission Expires 2/4/61

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
IN AND FOR THE COUNTY OF LOS ANGELES Dept. 67

Date April 3, 1959 Hon. Evelle J. Younger, Judge J E Rose, Deputy Clerk
Henry Smith, Deputy Sheriff Reporter
7 (Parties and counsel checked if present)

698923	Counsel for Plaintiff:	Youngman, Hungate & Leopold; Richard Hungate and Glenn Warner ✓
UPA Pictures, etc., et al vs Foote, Cone & Belding, Inc., et al	Counsel for Defendant	L. M. Coyle & Cooper ✓ for Liebmann Breweries

NATURE OF PROCEEDINGS

1	2	3	4	5	6
2	2	2	C	2	C

STATISTICAL CODE AO-BT

Motion of defendant Liebmann Breweries, Inc, appearing specially for the purpose of this motion only,
(1) to vacate and set aside order for service of process on defendant Liebmann Breweries,
(2) to quash, annul and set aside service of summons on said defendant
(fourth call)

SUBMITTED LATER:

MOTION DENIED

COUNSEL NOTIFIED BY CARD

Motion of defendant Liebmann Breweries, Inc, appearing specially,
(1) to object to questions in depositions offered in evidence by plaintiffs,
(2) to strike answers in depositions offered by plaintiffs,
(3) to strike portions of affidavits offered in evidence by plaintiffs

Oral motion of counsel for defendant to withdraw motion is granted.

This civil minute order was duly entered Apr 7—1959

Attest HAROLD J. OSTLY
County Clerk and Clerk of the Superior Court of the State of California in and for the County of Los Angeles
By W. H. Smith, Deputy.
Posted in R/A
by [illegible]

April 3, 1959 (7)